LIBRARY
SUPREME COURT, U.S.

No. 955

No. [redacted]

Office-Supreme Court, U.S.
FILED
JAN 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

LAWRENCE J. SIMMONS
Shoreham Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:

WOODROW E. FAULKNER
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Order below	41a
Jurisdiction	2
Question Presented	2
Statutes involved	2
Statement	2, 3, 4, 5
Reasons for granting the writ	5, 6, 7, 8, 9
Conclusion	9
Appendix A	1a-42a
Appendix B	42a-46a

CITATIONS

CASES:

Camero v. United States, 345 F.2d 798	8
Federal Communications Commission v. WJR, the Goodwill Station 337 U.S. 265	8
Goett v. Union Carbide Corp., 361 U.S. 357	9
Patterson v. Hewitt, 195 U.S. 309	6
Seminole Nation v. United States, 316 U.S. 1049	8, 9
Speidel v. Henrici, 120 U.S. 377	6, 7

STATUTES AND JOINT RESOLUTION:

Act of July 2, 1864, 13 Stat. 489	3, App. 42a
Joint Resolution of Congress, April 10, 1869, 15 Stat. 348	3, App. 17a, 43a
Act of May 7, 1878, 20 Stat. 56	App. 44a, 45a
Act of March 3, 1887, 24 Stat. 488	App. 45a, 46a

RULES:

Rule 64(d) of the Court of Claims	8

MISCELLANEOUS:

Lost Bond Case, page 206, Volume 5, 1884, First Comptroller of the Currency Decisions	6, App. 41a, 42a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 401-64

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Howard T. Foulkes, Administrator De Bonis Non Cum Testamento Annexo in the Will of Charles Durkee, deceased, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

ORDER BELOW

The Court of Claims did not render an opinion but did enter an order October 29, 1965 dismissing the petition without oral argument concluding that the claim was barred by the statute of limitations, 28 U.S.C. § 2501 and by the doctrine of laches.

JURISDICTION

The order of the Court of Claims was entered October 29, 1965 (App. 41a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Did the Court of Claims act in an arbitrary manner and in violation of Fifth Amendment Due Process in granting the Government's Motion for Summary Judgment dismissing, because of laches and limitations, Plaintiff's claim that the United States Treasury was holding as trustee funds received by it from the retirement of First Mortgage Bonds of the Pacific railroads, such dismissal being without oral argument and articulation of the reasons therefor and when genuine issues of material facts existed as to whether or not a trust had been created and repudiated by the trustee thereof.

STATUTES AND JOINT RESOLUTION INVOLVED

Act of July 2, 1864, 13 Stat. 489. App. 42a

Joint Resolution of the Congress, April 10, 1869, 15 Stat. 348. App. 43a

Act of May 7, 1878, 20 Stat. 56. App. 44a, 45a

Act of March 3, 1887, 24 Stat. 488. App. 45a, 46a

Rule 64(d) of the Court of Claims. App. 8

Pertinent portions of the above Joint Resolution and Statutes are set forth in Appendix B, infra, pp. 42a to 46a.

STATEMENT

Petitioner, Howard T. Foulkes, is the Administrator De Bonis Non Cum Testamento Annexo of the Wills of Charles Durkee and his wife, Caroline Durkee, both deceased. (App. 1a)

In order to finance their construction the Pacific railroads were authorized by the Act of July 1, 1862, 12

Stat. 489, and by the Act of July 2, 1864, 13 Stat. 356, to issue their 6% First Mortgage Bonds, sometimes called Paramount Lien Bonds (herein called Bonds). (App. 2a, 42a, 43a) Charles Durkee was a partner in John W. Kerr and Company, Salt Lake City, Utah, a firm which supplied materials for the construction of the railroads. (App. 16a)

Prior to the completion of the railroads President Andrew Johnson, without any apparent authority of law, ordered the railroads to deposit these Bonds with the Government as security for completion of the railroads. (App. 20a)

Pursuant to Joint Resolution of the Congress of April 10, 1869 the President appointed a commission to report whether the railroads had been completed satisfactorily. (App. 17a, 43a) Debates on this Resolution confirm that the President had called in these bonds. The Commission reported that the railroads were completed satisfactorily. After this report Charles Durkee proceeded to Washington, D. C. to claim the Bonds. His death enroute in Omaha, Nebraska in 1870 intervened. His personal records were transferred to the Metropolitan National Bank of New York City. Among these records were assignments to him of the Bonds, (App. 17a) which assignments cannot yet be found.

On April 22, 1884, in Washington, D. C., Leonard Blaisdell, attorney and husband of a niece of Charles Durkee, met with officials of the United States, including the Secretary of the Treasury and the Secretary of State, Frederick T. Frelinghuysen. At this meeting the Secretary of the Treasury acknowledged that Charles Durkee was the sole assignee of the Bonds. (App. 17a, 24a, 25a, 30a) The Secretary of State, Mr.

Frelinghuysen, executed a written statement dated January 19, 1885, impressed with the Seal of the United States, acknowledging the matters discussed in that meeting. (App. 35a, 36a)

The Government also acknowledged that it was holding these Bonds for the righful owners as is evidenced in the Lost Bond Case, Page 206, Volume 5, 1884, First Comptroller of the Currency Decisions. (App. 41a, 42a)

The Government's Motion for Summary Judgment refers to *Kuykendall* v. *Gage,* Equity No. 22,296, filed in the Supreme Court for the District of Columbia, and *Kuykendall* v. *Union Pacific,* filed in the Federal District Court in Utah, and to the opinion thereon by the Circuit Court in 163 F.2d 819 (1908). (App. 5a, 6a, 17a, 18a) The Government was not a party to either of these actions and neither was the Estate of Charles Durkee. Kuykendall petition to be appointed Administrator of the Durkee Estate in Wisconsin was denied. He then succeeded in being appointed in Utah which did not have jurisdiction because Charles Durkee at his death was domiciled in Wisconsin. Leonard Blaisdell filed a suit in 1894 in the Court of Claims, No. 18003. This was dismissed without prejudice on demurrer because he represented the heirs at law and not the estate. (App. 17a) Thus there has never been a legal representative of the estate of Charles Durkee until the claim was filed below by Petitioner.

The press release, upon which the Government concludes that the trust had been repudiated, states (App. 13a, 14a):

> "No bonds whatever have been deposited with any branch of the government by any of the Pa-

> cific railroads, except those deposited in pursuance of the Joint Resolution of Congress, April 10, 1869 (16 Stat. 56) which authorized the President to require from the companies security for the completion of the roads. The bonds so deposited, amounting to five million six hundred thousand dollars, were returned to the companies on the completion of the roads".

The bonds referred to in this press release are coupon bonds and are not the Bonds involved in this action as disclosed by the Finance Report, Vol. 28, page 237, and Vol. 29, page 193, referred to in the press release but not attached to it. The Bonds here are the ones Senator John Sherman of Ohio referred to in his speech on the floor of the Senate on April 9, 1869 (41st Congress, First Session, page 674 of the Congressional Globe) when he said (App. 19a, 20a)

> "For instance, the Union Pacific Railroad Company have already deposited, perhaps without any authority of law, three million dollars of their first mortgage bonds with the United States to secure the partial completion of their road".

Petitioner believes Respondent has documents which will assist in proving this claim, such as the Agreement between the railroads and the Government. This document and others have not been made available to Petitioner and the assistance of the Court of Claims will be required to obtain them. (App. 25a)

REASONS FOR GRANTING THE WRIT

The Court of Claims granted the Government's Motion for Summary Judgment even though the Opposition thereto showed convincingly that genuine issues of material fact existed. Plaintiff claimed that the

Government was holding trust funds composed of receipts from the retirement of the Bonds of the Pacific railroads. (App. 2a, 3a, 5a, 24a, 25a) The Government in its Motion denied that a trust existed but asserted if one did exist the trust had been repudiated. (6a) Genuine issues of material facts thus existed precluding summary judgment.

The Motion for Summary Judgment was granted without oral argument and without articulating the reasons why the statute of limitations and the doctrine of laches barred the claim. Fifth Amendment Due Process was thus denied.

The dismissal order permits the Government to escape its duties as a trustee and to expropriate funds of its citizens without any legal authority and without being required to admit or deny on the merits the validity of the claim.

It is respectfully asserted that this is an appropriate case for this Court to exercise supervisory powers over an inferior court.

1. The order of the lower court dismissing the claim was arbitrary and in violation of Fifth Amendment Due Process because genuine issues of material fact existed precluding Summary Judgment, there was no opportunity for oral argument and no articulation of the reasons why limitations and laches controlled.

(a) Laches and limitations do not bar a trust like this absent a repudiation of the trust which has been brought home unequivocally to the beneficiary. *Speidel* v. *Henrici* (1887) 120 U.S. 377, which was followed in *Patterson* v. *Hewitt* (1904) 195 U.S. 309. In *Speidel* this Court said, 120 U.S. p. 386:

> "As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the Statute of Limitations, because the possession of the trustee is presumed to be the possession of his cestui que trust . . . . But this rule is in accordance with the reason on which it is founded, and, as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to qualifications: that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust; * * * ".

A trust was created and a public acknowledgment made by the Government that it was holding these bonds for the rightful owners in the Lost Bond Case, page 206, Volume 5, 1884, First Comptroller of the Currency Decisions, which states (App. 41a, 42a):

> "The usage as to the bonds now in question, and as to all bonds presented for payment, or for the issue of a duplicate as to which there is a question of controverted ownership is to stamp them thus: 'Treasury Department, Office of the Secretary, April 22, 1884. Held for decision of ownership' and a proper record is to be made to protect the rights of claimants".

April 22, 1884, is the date that Leonard Blaisdell, attorney, had an official meeting with the Secretary of the Treasury and other Treasury Department officials together with the Secretary of State concerning the claim of Charles Durkee as the sole assigne of the Bonds here involved. (App. 17a, 24a, 25a, 30a)

The press release, as a purported repudiation of this trust, was not concerned with the bonds here involved and there is no evidence that the release was unequivo-

cally made known to the Durkee estates. Though not attached to this press release the financial report referred to therein describes the bonds which were deposited with the Government pursuant to the Joint Resolution of Congress referred to above. (App. 20a)

(b) Since there was a genuine dispute as to whether a trust was created and repudiated, genuine issues of material fact therefore existed precluding the granting of summary judgment. Rules and decisions of the Court of Claims so provide. *Camero* v. *United States* (Ct. Cl. 1965) 345 F.2d 798. Rule No. 64(d) of that court pertinently provides:

> "The judgment [Summary Judgment] shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(c) Fifth Amendment Due Process was denied when the lower court dismissed the claim without an opportunity of oral argument, without articulating the reasons why it "concluded" that limitations and laches barred the claim and while genuine issues of material fact existed.

Oral argument is not always required even for substantial questions but petitioner believes that procedural due process required an opportunity for oral argument under the circumstances of this case prior to any determination that limitations and laches barred the claim. *Federal Communications Commission* v. *WJR, the Goodwill Station,* 337 U.S. 265.

Whether a trust was created and repudiated were material issues and findings should have been made.

In *Seminole Nation* v. *United States,* 316 U.S. 1049, 1056, this Court commented upon the duty to make findings on material issues as fellows:

> "We do not say that all this establishes liability on the part of the Government for it is not our function, in reviewing judgments of the Court of Claims, to make basic findings of fact. When the Court of Claims fails to make findings on a material issue, it is proper to remand the case for such findings".

See also *Goett* v. *Union Carbide Corp.,* 361 U.S. 357, reversing a judgment for failure of the lower court to "articulate" the basis of its decision.

CONCLUSION

For the foregoing reasons Petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE J. SIMMONS
Shoreham Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:

WOODROW E. FAULKNER
Washington, D. C.

January 1966

APPENDIX A

ORIGINAL

IN THE UNITED STATES COURT OF CLAIMS

No.

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Plaintiff*

v.

THE UNITED STATES.

Petition

To the Honorable, the United States Court of Claims:

Plaintiff, Howard T. Foulkes, as Administrator De Bonis Non Cum Testamento Annexo of the Estates of Charles Durkee and Caroline Durkee, deceased, and also as Secretary-Treasurer of the Board of Trustees of Racine College, Racine, Wisconsin, residuary beneficiary herein, respectfully represents:

1. Plaintiff is a citizen of the United States, a resident of Milwaukee, Wisconsin, and is presently the duly appointed, qualified and acting Administrator De Bonis Non Cum Testamento Annexo of the Estates of Charles Durkee and Caroline Durkee, deceased, such appointments having been made by the County of Kenosha County, State of Wisconsin, on May 3, 1945. A certified copy of the record of each appointment is filed herewith. Plaintiff further says that Charles Durkee and Caroline Durkee were residents of Kenosha County, State of Wisconsin, at the time of their

deaths, which occurred on January 14, 1870 and February 22, 1911, respectively. Plaintiff further represents to the Court that both decedents left Last Wills and Testaments, which were duly admitted to probate by the Kenosha County Court in Probate in and by the County of Kenosha, State of Wisconsin.

2. Plaintiff further respectfully represents to this Court that the said Charles Durkee, deceased, during his lifetime became the owner of certain Paramount Lien Bonds issued pursuant to Acts of Congress dated July 1, 1862 and as amended by Congress by an Act on July 2, 1864. Said Acts of Congress were for the purpose of encouraging the construction of railroads in the United States, and at the time of the death of Charles Durkee, he owned bonds issued under the foregoing Acts, under the terms of which the following railroads were interested parties:

Union Pacific
Central Pacific
Denver Pacific
Kansas Pacific
Central Branch U. P.
Sioux City.

Plaintiff further represents to the Court that the said Charles Durkee, owned bonds in the above railroads, by virtue of cash purchases, construction contracts, sale of supplies and professional services rendered to said railroad companies.

3. Plaintiff respectfully represents to this Court that by Acts of Congress dated May 7, 1878 and March 3, 1887, the several railroads involved deposited funds into a sinking fund for the purpose of retiring said bonds referred to herein. Plaintiff further represents that the matured value of the Paramount Lien Bonds as of 1900 was $187,500,000.00

4. Plaintiff further respectfully represents to this Court that by the terms of the Last Wills and Testaments of

Charles Durkee and Caroline Durkee, deceased, the said Racine College of Racine, Wisconsin, is the residuary beneficiary. It is plaintiff's information and belief that funds in excess of the $187,500,000.00 have been paid into the sinking fund and are presently carried as trust assets in the records and files of the United States Treasury Department.

5. Plaintiff further respectfully represents to this Court that no part of said sum of $187,500,000.00 has been paid to the plaintiff. Plaintiff and the principal parties in interest herein, namely: Racine College of Racine, Wisconsin, has at all times borne true allegiance to the Government of the United States and has not in any way or by any act encouraged any adverse interests against the said Government. Plaintiff represents that the said residuary beneficiary, namely: Racine College is justly entitled to the amount claimed herein from the United States.

WHEREFORE, plaintiff prays judgment against the United States in the sum of One Hundred Eighty-seven Million Five Hundred Thousand and no/100 ($187,500,000.00) Dollars and for such further relief as to this Honorable Court may seem proper in the premises.

HOWARD T. FOULKES
Howard T. Foulkes, as Administrator De Bonis Non Cum Testamento Annexo of the Estates of Charles Durkee and Caroline Durkee, deceased, and Secretary-Treasurer, Board of Trustees of Racine College.

CITY OF MILWAUKEE
STATE OF WISCONSIN } ss:

HOWARD T. FOULKES, being duly sworn, deposes and says that he is the plaintiff and that as such he is authorized to verify the foregoing petition; that he has read the said petition and knows the contents thereof; and that the state-

ments contained therein are true to the best of his information and belief.

HOWARD T. FOULKES

Subscribed and sworn to before me this 17th day of November, 1964.

ANN HORNAK, *Notary Public*

EFFLER & BARONE
320 Ontario Street
Toledo, Ohio
Attorneys for Plaintiff

IN THE UNITED STATES COURT OF CLAIMS

No. 401-64

HOWARD T. FOULKES, Administrator De Bonis Non Cum Testamento Annexo in the Will of CHARLES DURKEE, DECEASED, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*,

Defendant's Motion for Summary Judgment and Supporting Brief

This is a claim for the sum of $187,500,000 allegedly carried as trust assets in the U. S. Treasury for the purpose of retiring certain bonds issued for the construction of the Pacific railroads.

Defendant moves the Court for a summary judgment in its favor and dismissing the petition for the reason that

there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. The amount of the claim is not conceded nor is it considered to be material fact for the purposes of this motion.

Questions

1. Is the claim barred by laches and the statute of limitations?

2. Is the claim barred by the doctrine of res judicata?

Facts

Plaintiff administrator de bonis non of the estates of Charles Durkee deceased 1870 and Caroline Durkee deceased 1911 alleges that Charles Durkee owned certain Paramount Lien Bonds issued to finance the construction of the Pacific Railroads, that the railroads deposited funds for the retirement of the bonds into a sinking fund held by the United States Treasury, that the funds are carried as trust assets by the Treasury, and that Racine College the residuary beneficiary of the estates is entitled to the amount claimed.

The claim has a long history. It was first brought before this court by Leonard C. Blaisdell, a beneficiary of the estate. Blaisdell as a beneficiary not being the proper party to bring the suit, the case was dismissed, 31 Ct. Cl. 464 (1896), and a new action was brought by John A. Kuykendall the administrator of the estate of Charles Durkee. A copy of Kuykendall's petition is attached as Exhibit A. Kuykendall's petition was also dismissed, 35 Ct. Cl. 639 (1900), and he then brought a petition for an accounting against the Secretary of the Treasury and the Treasurer of the United States in the Supreme Court of the District of Columbia. A copy of the petition in the Supreme Court is attached as Exhibit B. This action was dismissed on the complainant's motion. Docket entry—

April 2, 1902, *Kuykendall* v. *Gage,* Equity No. 22, 296, Supreme Court of the District of Columbia. Kuykendall then brought a bill in equity against the Union Pacific Railroad to have the bonds declared a first lien against the property of the railroad but failed to produce sufficient evidence to show that Charles Durkee had ever owned the bonds and the bill was dismissed on the merits. *Kuykendall* v. *Union Pacific,* 163 Fed. 819 (1908).

In 1914 the Treasury Department issued a press release warning the public that certain persons were trying to sell shares in the Charles Durkee bond claim, that there was no basis for the claim, and that "money paid for a share or interest in this so called claim will be money thrown away." A copy of the release is attached as Exhibit C. In spite of their lack of success in the courts and the adverse Treasury publicity, the promoters persisted in their efforts to make something out of the claim and ultimately received a conviction for mail fraud for their trouble. *Stearn et al.* v. *United States,* 18 F. 2d 465 (1927).

Argument

1. The claim is barred by the statute of limitations and by laches.

The petition fails to show that the claim accrued within the six year statute of limitations, 28 U.S.C. 2501. This is more than an oversight; the same claim was brought by Kuykendall, the plaintiff's predecessor as administrator of the estate, in 1896. Even if the claim is considered to be one for money held in trust, the period of limitation begins when the trust is repudiated. *Harrison* v. *United States,* 20 Ct. Cl. 175 (1885); *United States* v. *Louisiana,* 197 U.S. 182 (1888). The statute runs against administrators *Hicks* v. *Missouri Pacific Railroad,* 181 F. Supp. 648, 653 (1960). The claim is also barred by the equitable doctrine of laches. *Waller* v. *Texas and Pacific Railroad,* 245 U.S. 398, 410 (1918).

2. The claim is barred by the doctrine of res judicata.

Plaintiff alleges that his decedent Charles Durkee owned Paramount Lien Bonds with a matured value of $187,500,000 in 1900. In 1896, when plaintiff's predecessor Kuykendall brought his action in this Court, defendant denied that Charles Durkee had owned the bonds. After dismissing his action in this Court and in the Supreme Court of the District of Columbia, Kuykendall brought a suit against the Union Pacific in the United States Circuit Court for the District of Utah alleging that Charles Durkee had owned $27,229,000 bonds issued by that railroad and asking to have those bonds declared a first lien on the railroad's property. The Circuit Court dismissed the suit, and on appeal the Circuit Court of Appeals held:

* * * * *

> The prayer of the bill is for an accounting to the complainant on account of said $27,229,000 bonds and interest, and for the enforcement of the mortgage lien for payment, etc.
>
> As the ownership of the bonds in question by Durkee, at the time of his death, was put in issue by the answer, it was a primary issue of fact, lying at the threshold of the complainant's right to any relief. Unless he owned the bonds at the time of his death, and they passed by devolution of law to the complainant as administrator, the latter has no standing in court to assert any of the matters set forth in the bill. This was so self-asserting that at the opening of the argument by counsel for the complainant on this appeal we insisted that they point out to the court, in the record, the proof touching this foundational fact before they proceeded to the discussion of other matters in contestation. . . .
>
> * * * * *
>
> As the complainant, when he closed the taking of testimony on his behalf, had failed to produce suffi-

cient evidence of the ownership of the bonds declared on, the defendant was justified in declining to take countervailing testimony.

• • • • •

Kuykendall v. *Union Pacific, supra,* pp. 820, 823. Thus the question of Charles Durkee's ownership of the bonds had already been decided adversely against the estate after a trial on the merits. The estate has had a full opportunity to litigate the question and should not now be permitted to litigate the same question against another defendant. *Eisel* v. *Columbia Packing Co.,* 181 F. Supp. 298 (1960).

Conclusion

The administrators of the estate of Charles Durkee had an ample opportunity to present this case to this Court in 1900 and failed to do so. The question of Durkee's ownership of the bonds has been litigated and decided against them. There is no dispute about these material matters of fact; therefore the defendant's request for a summary judgment should be granted and the petition dismissed with prejudice.

Respectfully submitted,

John W. Douglas
Assistant Attorney General
Civil Division

R. W. Koskinen
Attorney, Civil Division
Department of Justice

EXHIBIT A

IN THE COURT OF CLAIMS OF THE UNITED STATES

TERM 1895-96

No. 18,003

JOHN A. KUYKENDALL, administrator with will annexed, of the Estate of CHARLES DURKEE, DECEASED

v.

THE UNITED STATES

ADMINISTRATOR'S PETITION

The petitioner, John A. Kuykendall, administrator of the Estate of Charles Durkee, deceased, respectfully represents:

1. That he is a citizen of the United States, residing at Salt Lake City, State of Utah; that the decedent was a resident of Salt Lake City, Territory of Utah, at the time of his decease, January 14, 1870; that the decedent and petitioner always yielded true allegiance to the United States;

That the claim hereinafter sued on is owned and held by Estate of said decedent, the same never having been sold or assigned to any person or persons prior to his decease.

That the petitioner is the duly qualified and acting administrator with the will annexed of the Estate of the said Charles Durkee, deceased, and files this petition as such administrator, and in the behalf of said estate.

2. That said Charles Durkee, deceased was, during his life time, and at his decease, the owner and holder of first mortgage bonds of the Union and Central Pacific Railroad Companies as said companies were originally organized

and chartered, in the sum and aggregate amount of $64,623,512 which were in the year 1884, according to law deposited in the Treasury of the United States to be held in trust for the lawful owner and holders thereof and the said bonds are now held by the United States, as petitioner is informed and believes, for the use and benefit of the said estate except as hereinafter stated.

3. That the Government of the United States has, in pursuance of said trust, since the deposit of said bonds in the said Treasury, the exact date and dates thereof being unknown to your petitioner, collected of the Union Pacific Railroad Company Twenty Million Dollars on said bonds under the laws regulating and controlling the management and supervision of said railroads, and has neglected and failed to pay over to said Estate said sum or any part thereof, although often requested so to do.

4. And your petitioner says, that said estate, and he, as administrator thereof, is justly entitled to the said moneys so collected and held as aforesaid, and that said sum is justly due said estate from the Defendant and remains wholly unpaid.

That all moneys collected by the Defendant on account of said bonds and now held by the Defendant therefrom are justly due and owing from the United States to said estate; that the said moneys remain wholly unpaid; that Defendant hath refused and still refuses to pay same, although the payment thereof has often been demanded of the Defendant.

WHEREFORE, the petitioner demands judgment against the Defendant in the sum of $20,000,000, and all proper relief in the premises.

/s/ JOHN A. KUYKENDALL
Administrator with will annexed
of the Estate of Charles Durkee,
deceased.

* * * * *

EXHIBIT B

Petition for an Accounting

In the Supreme Court, District of Columbia

John A. Kuykendall, Administrator of the estate of Charles Durkee, deceased

v.

Lyman J. Gage, Secretary of the Treasury
Ellis H. Roberts, Treasurer of the United States

Petition for an Accounting

To the Honorable Edward F. Bingham, Chief Justice of the Supreme Court of the District of Columbia.

The petition of John A. Kuykendall, Administrator of Charles Durkee, deceased, respectfully represents:

1. That your petitioner is a citizen of the United States, and of the State of Utah.

2. That the said Charles Durkee, deceased, was a citizen of the United States and of the Territory of Utah at the time of his death on the 14th day of Jan. 1870.

3. That at the date of his decease, the said Charles Durkee was Governor of the said Territory, and doing business in Salt Lake City, Utah.

4. That said Complainant has filed all the necessary evidence and established a claim against the United States Government for the amount due said estate, with and in the Executive Department of the United States Government, where the same has been duly adjudicated and said claim

has been sent to the Warrant Division of the Treasury Department for payment.

5. The Complainant alleges that there is an unnecessary delay and a refusal to pay said claim which is now due said estate, a demand for the same has been made on Lyman J. Gage, Secretary of the Treasury, and Ellis H. Roberts, Treasurer of the United States.

6. The Complainant alleges that the Chief Clerk of the Warrant Division said the Secretary of the Treasury refused to sign a letter acknowledging the receipt of the claim and said refusal is still maintained.

7. Ellis H. Roberts, Treasurer of the United States, refuses to pay the sum due said estate out of the trust fund under his control and so held by him as custodian for the said estate of the said Charles Durkee, deceased, as aforesaid.

8. The Complainant alleges that the said Ellis H. Roberts, Treasurer of the United States has in his custody the money belonging to the estate of Charles Durkee, deceased, and that the right to said money is vested in the aforesaid John A. Kuykendall, Administrator of the estate of Charles Durkee, deceased, and is now due and unpaid.

9. Your petitioner, therefore prays, that the said Lyman J. Gage, Secretary of the Treasury of the United States, and Ellis H. Roberts, Treasurer of the United States, may be compelled by rule of this Court to render an account of the trust funds in their custody known as the money collected under the direction of the President of the United States, from the Union Pacific and Central Pacific and other Railroad Companies, now due said estate, and that a decree be entered against the said Lyman J. Gage, Secretary of the Treasury, and Ellis H. Roberts, Treasurer of the United States, requiring them to pay John A. Kuykendall, Administrator of the estate of Charles Durkee,

deceased, the amount of money due said estate, as appears of record in their respective offices and to be paid on a day certain named therein for the purpose aforesaid, or judgment for the sum of $79,000,000.00 with interest on default.

And your petitioner will ever pray, &c.

/s/ JOHN A. KUYKENDALL

Administrator for the estate of Charles Durkee, deceased.

D. W. WOOD,
Solicitor for Complainant.

EXHIBIT C

TREASURY DEPARTMENT

Washington

FOR THE PRESS

January 26, 1914.

Information has reached the Department that certain persons are endeavoring, in various parts of the country, to sell shares or interests in an alleged claim of the estate of Charles Durkee, deceased, against the United States:

This claim, briefly stated, is that Charles Durkee was the owner of the entire issue of "first mortgage" or "paramount lien" bonds of the several Pacific railroad companies which received aid from the Government, such issue amounting, in round numbers, to $64,000,000; that he deposited these bonds with the Treasury Department to secure the completion of the Pacific railroads; and that, on the completion of such roads, the Government, instead of returning the bonds to the said Durkee or his estate, sold them, and now holds the proceeds ($64,000,000, with interest) as trustee for the said estate.

The Department is informed that the promoters of the alleged "claim" are representing that the justice thereof

was admitted by the late Secretary of the Treasury, Franklin MacVeagh, and that he was about to direct payment of the same when he left the Department.

The records of the Department show that there is no foundation whatever for the alleged claim; and that the statement as to the admission made by, and the proposed action of, the late Secretary is false. No bonds whatever have been deposited with any branch of the Government by any of the Pacific railroads, except those deposited in pursuance of the joint resolution of Congress, April 10, 1869 (16 Stats., 56), which authorized the President to require from the companies security for the completion of the roads. The bonds so deposited, amounting to $5,600,000, were returned to the companies on the completion of the roads. (Finance Report, Vol. 28, page 237, and Vol. 29, page 193.)

The act of May 7, 1878 (20 Stats., 58), and the act of March 3, 1887, Sec. 5 (24 Stats., 488), provided that a sinking fund should be established in the Treasury of the United States for the satisfaction of the indebtedness of those companies to the United States on account of aid extended them in the construction of their roads, the said fund to be invested in the United States bonds or first-mortgage bonds of said companies. The bonds for that fund were purchased in the open market, and when the railroads paid their said indebtedness to the Government (represented by "subsidy bonds"), the said fund was closed and the bonds then to its credit were disposed of in accordance with the terms of the debt settlements agreed upon between the Government and the representatives of the railroad companies.

Other than as above set forth there have been no deposits of bonds of any kind with the Government on account of any of the Pacific raidroads.

All persons are warned that money paid for a share or interest in this so-called claim will be money thrown away.

IN THE UNITED STATES COURT OF CLAIMS

No. 401-64

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Opposition to Defendant's Motion for Summary Judgment

There are genuine issues of material facts which compel the denial of Defendant's Motion for Summary Judgment.

Counterstatement of the Facts

The Act of July 1, 1862 (12 Stat. 489) provided:

> "An Act to aid in the construction of a railroad and telegraph line from Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes."

Pursuant to this Act of the Congress created and incorporated the Union Pacific Railroad Company and authorized and empowered it, together with the Central Pacific Railroad Company, the Kansas Pacific Railroad Company, Union Pacific Railroad Company (Central Branch), Sioux City and Pacific Railroad Company, and the Western Pacific Railroad Company, to build and construct a railroad and telegraph line from the Missouri River to the Pacific Coast. The Act also provided for Government subsidy aid for the construction through the grant of land patents and the issuance of 30 year six percent bonds, which were to become First Lien and Mortgage Bonds upon the railroad and telegraph lines, including all the rolling stock, fixtures and other property. It was extremely difficult, almost impossible, for the railroads to interest private capital in the venture and it soon became apparent

that the project would fail unless some measures were devised to attract public finance.

Confronted with this state of affairs the Congress by the Act of July 2, 1864 (13 Sat. 356, Sec. 10) amended the Act of July 1, 1862 (12 Stat. 489), above quoted, and empowered and authorized the railroad companies to issue their own bonds on their respective railroad and telegraph lines in equal amount and of even tenure and date, time and maturity, rate and character of interest, as the Subsidy Bonds which the Government was required to issue. This Act provided that these company-issued bonds were First Liens and Mortgages upon the respective roads, property and equipment and were paramount and superior to the Subsidy Bonds issued or to be issued by the United States.

Pursuant to this statutory authority the railroads issued their Paramount Lien Bonds to the extent of $64,000,000.00. The Government also issued its Subsidy Bonds in like amount as well as land grant patents for railroad right of ways. These bonds were issued piecemeal over a period of years up to 1869.

Charles Durkee was a former United States Congressman and United States Senator from Wisconsin. Later he was appointed Governor of the Territory of Utah. He was a senior partner in the firm of John W. Kerr and Company, Salt Lake City, Utah, a firm that supplied materials for the construction of these railroads. Up through 1869 he owned or controlled all of the Paramount Lien Bonds of the above railroads.

Sometime in 1867 President Johnson without any apparent authority of law ordered the railroads to deposit their Paramount Lien Bonds with the Government as security for the completion of the railroads. Available records indicate compliance sometime prior to or around 1869. As a result of a Joint Resolution of the Congress, April 10,

1869, the President of the United States appointed a Commission to investigate and report back to him on whether the railroads had been satisfactorily completed. This Commission completed its report and advised the President in late 1869 that the railroads were completed and satisfactory. Upon learning of this Charles Durkee resigned as Governor of the Territory of Utah, wound up his business and association with the John W. Kerr Company and proceeded to Washington to claim the Paramount Lien Bonds which he owned or controlled. He died enroute in Omaha, Nebraska, in 1870. His personal papers and records were transferred to the Metropolitan National Bank, New York City. Contained in these documents were the assignments to him of the Paramount Lien Bonds. This bank failed May 14, 1884, and its records transferred to the Comptroller of the Currency.

Pursuant to correspondence between L. C. Blaisdell, attorney and husband of a niece of Charles Durkee, and officials of the United States Treasury Department a meeting between them was held in Washington, D. C., April 22, 1884. At this meeting the Secretary of the Treasury with First Comptroller Lawrence, the Secretary of State of the United States, and others informed Blaisdell that Durkee was the owner of the Paramount Lien Bonds. After unsuccessful attempts to secure a settlement of the Durkee claim through administrative channels, he filed suit in the Court of Claims, No. 18003. This was dismissed without prejudice on the Government's demurrer because he was not a proper party plaintiff, in that he represented the heirs and not the estate of Durkee. John A. Kuykendall also filed a suit in the United States District for Utah against the Union Pacific. The Government was not a party to this action. This action was dismissed and affirmed on appeal (163 Fed. 819 (1908)). The Court of Appeals found also that Durkee was domiciled in Wisconsin and not in Utah on the date of his death as alleged. 163 Fed. p. 882. Kuykendall also filed suit for an accounting in

the Supreme Court of the District of Columbia which was dismissed on his own motion without prejudice. In all of these actions it was alleged that Durkee was a resident of Utah at the time of his death.

The Government collected $64,000,000.00 in cash from the railroads to be held for the true owners of the Paramount Lien Bonds. The Government has never paid these monies over to the owners.

Other pertinent facts will be related and discussed under the Arguments relating to the Affirmative Defenses raised in Defendant's Motion for Summary Judgment.

The Claim Is Not Barred by Res Judicata

The Government was not a party to the Kuykendall action in Utah and it was filed by a person having no authority to do so. Kuykendall tried but was unable to obtain Letters Testamentary in Wisconsin. It was the duty of the Court to dismiss the action because the proper parties were not before it. *House* v. *Mellen,* 22 Wall (U.S.) 42, 22 L.ed. 338. The language of the Supreme Court in this case is important upon the applicability of the judgment entered in Utah. The Court said, 22 Wall, p. 46:

> "But when a bill is dismissed for misjoinder of parties it settles nothing but that the suit cannot progress in that condition; and if the parties will not or cannot amend so as to remove that difficulty, the court will go no further, but will dismiss the bill. It does not and cannot, in the nature of things, conclude either party upon the merits of the matter in controversy, and the plaintiffs, or any of them, should be at liberty to bring another bill with proper parties, in regard to the subject matter of the first one. And the right to do this cannot be doubted when it appears plainly that the first bill was dismissed either for want of necessary parties, or for a misjoinder of

parties, or when by the terms of the decree the bill is dismissed without prejudice.

In Hughes v. United States (1866), 4 Wall (U.S.) 232, 237 the Supreme Court said:

> "If the first suit was dismissed for defect of pleadings, or parties or a misconception of the form of the proceedings, or the want of jurisdiction, or was disposed of on any grounds which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

The judgments or orders entered in the three actions filed by Kuykendall in Utah, in the Court of Claims and in the Supreme Court of the District of Columbia are therefore not res judicata of the present action filed by Foulkes as the duly and properly appointed administrator of the estates of Charles and Caroline Durkee.

The Claim Is Not Barred by Laches or the Statute of Limitations

Laches and Statute of Limitations do not bar a trust unless there is a denial or repudiation that is brought home unequivocally and clearly to the cestui. This doctrine was set forth in *Speidel* v. *Henrici* (1887) 120 U.S. 377 and followed in *Patterson* v. *Hewitt* (1904) 195 U.S. 309. In *Speidel* the Court said, 120 U.S. p. 386:

> "As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the Statute of Limitations, because the possession of the trustee is presumed to be the possession of his cestui que trust. . . . But this rule is in accordance with the reason on which it is founded, and, as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to qualifications: that time begins to run against a trust as soon as it

is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust; * * *"

The press release, Exhibit C to Defendant's Motion, is not concerned with the bonds that are involved in this litigation and have no relationship to the issues raised in it. In a speech made on the floor of the Senate in support of a Joint Resolution of April 10, 1869, Senator John Sherman of Ohio said (41st Congress, First Session, page 674 of the Congressional Globe):

"Mr. Casserly. Certainly.

"Mr. Sherman. That question was examined by the Pacific Railroad Committee. In the first place, the contingency is not likely to arise, because either company has sufficient bonds yet coming to it or still in the possession of the Government to make the security probability amply sufficient. For instance, the Union Pacific Railroad Company have already deposited, perhaps without any authority of law, $3,000,000 of their first mortgage bonds with the United States to secure the partial completion of their road. This has been done not in strict pursuance of law, because there is no law probably that could have required or authorized the officers of the Government to receive them; but still, as we know from the official report, that amount of bonds has been deposited already with the Government. Then there is still a large amount, perhaps as much more, in subsidy bonds, payable to this company when it shall have completed its line to the point agreed upon. So that in all probability the case put by the Senator from California is not likely to arise, and if it does arise the law is ample now.

"Here the authority is given to the President to make a requisition for the amount necessary. The act of 1864 authorized the President, where the companies

fail to comply with the requisitions of the law in any particular, to appoint a receiver in certain cases, and in other cases to institute legal proceedings. Perhaps this particular case was not contemplated in the act of 1864; but it was thought best to postpone any further remedy in case they should fail to comply with these requisitions until the next session of Congress. It is hardly fair to presume that they will not comply with the requisitions. If they do not comply I think the law already is sufficient to authorize the Attorney General to institute proceedings to take possession of the road for failure to comply with the law; but if that authority is not full and ample we can provide it at the next session of Congress. In the mean time all money due to them will be withheld from this time forth. From the passage of this act they can receive no more money from the government of the United States, no more bonds. They cannot draw back the bonds that are already deposited with the Government until the road is a completed road within the language of the law.

"That is the only answer I am able to give to the Senator, but it has been considered, and it was thought not advisable to contemplate compulsory or penal proceedings, based upon their refusal to comply with the requisition made.

"Mr. Casserly. I would suggest to the Senator from Ohio one difficulty. I understand him to say that the Union Pacific Company has deposited $3,000,000. There will be about three million dollars coming to them for work remaining to be done up to the settled point of junction, making $6,000,000 in all. Now, if I remember rightly, the report of the board of commissioners, of which the late General Barnes was one, stated that the amount necessary to bring that road up to the standard of a first class road was over six million dollars.

"Mr. Sherman. But we have also official information that much of the work that was then incompleted has since been completed by the Company, and a very large amount of material is on hand which was not included in their estimate, so that I have no doubt the $6,000,000 provided for will be amply sufficient to complete the road. According to the official reports we have before us $6,000,000 was the estimated amount necessary to complete the road up to then point of construction; and this did not include a very large amount of material then on hand for the completion of the road. I beleive it is stated now that about two millions of the work included in the $6,000,000 has since been done by the Union Pacific Company, so that on the whole I think the security provided for is ample; at any rate it is all we can get, and I think it will be sufficient."

As the speech of Senator Sherman clearly indicates in response to a question asked him it is apparent that the bonds he was referring to are the bonds that were called in illegally and not the bonds referred to in the Press Release. The Finance Report referred to in the Press Release clearly sets out what kind of bonds these bonds were.

The Government here is relying on the Kuykendall action filed in Utah. Plaintiff calls attention to testimony favorable to him. On page 232 of the Transcript of the Testimony John T. Dewees, Attorney at Law, Denver, Colorado, and former Congressman from North Carolina during the Civil War, stated he was well acquainted with both Charles Durkee and his partner John W. Kerr. Portions of his testimony follow: (Pages 231-232)

"Question: Do you know anything about this [Durkee's] wealth at that time [1869]?

"Mr. Gould: I object to the question as irrelevant, incompetent and immaterial.

"Answer: Only by report. I had no business connection with him.

"Question: What was he reported to be worth at that time?

"Mr. Gould: Objected to as irrelevant, incompetent and immaterial and as calling for hearsay.

"Answer: Some half million dollars."

And on page 264 and 265 the following testimony was given:

"Question: On page 58 of your former testimony, you stated that those bonds were usually $1000 bonds; did you handle all the bonds in Governor Durkee's possession, and are you sure they were all $1000 bonds?

"Answer: I did not examine all the bonds Governor Durkee had; there were a large amount of bonds in his possession, but a large number of them for $2500 to $5000, were also there. As well as I remember, the bonds were usually of the denominations that were easiest for the contractors and sub-contractors to handle.

"Question: In your testimony in regard to the number of times you met Governor Durkee and talked with him, your answers seem to be a little confusing; will you please explain the first time you met Governor Durkee and your conversation with him regarding the first mortgage bonds or lien of the Union, Central, Kansas and Western Pacific Railway Companies?

"Answer: The first conversation I had with Governor Durkee was at Salt Lake City in his office; he went with me from there to Mr. J. W. Kerr's place of business or office and told me he was his (Kerr's) partner; that was fully eight months previous to his death.

"Question: When and where was the second conversation in regard to these bonds?

"Answer: At Cheyenne, Wyoming; I was then on my way to Salt Lake City to see Governor Durkee, when I learned that he was on his way east from Salt Lake City; I stopped over in Cheyenne, Wyoming, until the eastern bound Union Pacific train (109) came into the Cheyenne Junction, and went aboard the train and [has] the second conversation with him, when he told me he was on his way east to find a market for his bonds, as he owned or controlled all the first mortgage bonds of the Union, Central and Kansas Pacific Railways and all their branches.

"Question: Did you examine these bonds in the office of J. W. Kerr & Co. on the Union, Central, Kansas and Pacific Railways?

"Answer: Yes, sir.

"Question: What, if anything, did Kerr say about owning the bonds of the First Mortgage and secured on the Union, [Central], Kansas and Western Pacific Railways?

"Answer: Mr. Kerr, in Durkee's presence, stated they owned or controlled all of the First Mortgage Bonds on the Union, Central Kansas and Western Pacific Railways and their branches, that had been issued in aid of their construction."

L. C. Blaisdell also testified (Exhibit A attached hereto) as to the meeting he had with Secretary Folger and other officials of the Government on April 22, 1884. William R. Russell testified that the Paramount Lien Bonds were in the vaults of the United States Treasury (Exhibit B).

As to further evidence of the meeting between Blaisdell and Government officials on April 22, 1884, Secretary of

State Frelinghuysen by an affidavit executed January, 1885 (Exhibit C) stated that he attended a meeting of April 22, 1884, between Blaisdell and other Government officials, at which time the Paramount Lien Bonds were exhibited and Secretary of Treasury Folger stated that Charles Durkee was the sole assignee of all of these Paramount Lien Bonds. Documents deposited in the Archives of the United States (Exhibits D and E) also clearly show that this meeting was held.

The Government has publicly acknowledged that it was holding these Paramount Lien Bonds for the rightful owners and thus an express trust is established. See Lost Bond Case, page 206 of Volume 5, 1884, First Comptroller of the Currency Decisions, which states:

> "The usage as to the bonds now in question, and as to all bonds presented for payment, or for the issue of a duplicate as to which there is a question of controverted ownership is to stamp them thus: 'Treasury Department, Office of the Secretary, April 22, 1884. Held for decision of ownership' and a proper record is to be made to protect the rights of claimants."

Charles Marshall Foree, Chief Clerk of the Office of the Comptroller of the Treasury for 40 years and who held that position in 1884 testified in the Kuykendall case in Utah stated (page 237 of the Transcript) that he had initialed this decision and referred to it as the Lost Bond Case.

From the above it is apparent that there are genuine issues of material facts which preclude the granting of Summary Judgment. In addition there are other records in the possession of the Defendant which will throw light upon this case and prove the validity of the claim as set out in the complaint. Plaintiff needs the assistance of the Court in obtaining them.

Plaintiff as the first truly authorized representative of the estate of Charles Durkee should be given the opportunity of proving the facts pertaining to the validity of this claim and it ought not to be disposed of without a trial upon the merits.

The Defendant's Motion for Summary Judgment should be denied.

Respectfully submitted,

LAWRENCE J. SIMMONS
Attorney for Plaintiff
934 Shoreham Building
Washington, D. C. 20005
NAtional 8-3996

EXHIBIT A

DEPOSITIONS OF LEONARD C. BLAISDELL

And afterwards and on the 3rd day of January, 1906, depositions of Leonard C. Blaisdell were filed, which, being entitled in said court and cause, are in words and figures following, to-wit:

This deposition is taken by agreement of the attorneys in the case, D. W. Wood appearing for the plaintiff and Judge L. E. Payson, appearing for the defendant before J. R. Young, Clerk of the Supreme Court of the District of Columbia, personally appeared Leonard C. Blaisdell, who was by said clerk first duly sworn and deposes and states as follows:

Q. You will state your name, age, residence and occupation.

A. Leonard C. Blaisdell; 68 years of age, residence Champange City, Champange County, State of Illinois; attorney.

Q. Were you acquainted with Joseph G. Cannon, Charles J. Folger and Judge William Lawrence? If so, state when you first became acquainted with him, and under what circumstances, and if the business was connected with the estate of Charles Durkee. State fully.

A. In answer to the first interrogatory I state, yes, sir. I was first acquainted with Joseph G. Connon some years prior to the year 1885; I became acquainted with Charles J. Folger and Judge William Lawrence on April 22, 1884, through introduction by Hon. Joseph G. Cannon. The circumstances under which I became thus acquainted were that there was certain business with the estate of Charles Durkee which connected the legal representative of said estate with matters concerning Pacific Railroads. The subject matter of investigation on the part of the government appeared to be the single question, who was the proper legal representative of the estate of Charles Durkee? With whom it was legal and proper for the government, through its Attorney General, to determine certain questions then pending between the Government and the Pacific Railroad Company. The material question pending at that time was, had the owners of the bonds, whose lien by Act of Congress was made prior and paramount to that of the United States, under the circumstances which then existed, the right to move the Attorney General to enforce the provisions of the Acts of Congress made for foreclosure of mortgages in case of default in the payment of interest accrued. The Secretary of Treasury, Charles J. Folger personally presented a statement of the case to the Attorney General, Benjamin H. Brewster. After Judge Folger's presentation of the case and of the matters and questions involved in the statement, and Judge Folger having made a statement of his own legal opinion concerning these matters, Judge Brewster replied, "I fully concur with you, Judge, in your statement of the facts and your conclusions. The right of foreclosure, as vested by Acts of Congress, unquestionably vest in the party whom

you have presented, L. C. Blaisdell." Judge Folger then used these words, in addressing L. C. Blaisdell: "You have just heard the decision of the Attorney General in the subject matter of this case. Allow me to make to you some explanations respecting the peculiar circumstances and conditions of this case."

• • • • • • • • • •

"The first thing that he spoke about was the special provision in the Act of Congress that the interest accruing upon the bonds before mentioned accrued semi-annually, and that it has been a question in his own mind whether the bonds executed by the Companies as interest bonds and lodged with the Secretary of Treasury of the United States, conformed to the provisions of the said Acts of Congress. Now, here, at this point, I will present another question to you, Judge Brewster. The question is, briefly, do these interest bonds constitute payment of interest within the proper construction of the Act."

Judge Brewster answered the question by saying: "I hold that they constitute only securities for the payment of interest, as such, they are valid securities, but they are not payments of interest within the strict conception of the Act of Congress.

The particular bonds, the subject of this adjudication, were bonds that were brought into the room on the occasion by Secretary Folger and the attendant members of the Cabinet, and were placed upon the series of tables that surrounded the room. Judge Folger selected a sample of the bonds from each one of the companies concerned, and read very carefully, in his address to Judge Brewster, the entire contents of these bonds. Such reading disclosed the fact that each and every one of the bonds referred to were executed under the seals of the respective Pacific Railroad Companies, and provided for foreclosure of said first mortgage bonds in event of default in the payment of interest for the period of six months or more. Then Judge Folger,

continuing his remarks to me, first stated that he was himself, somewhat solicitous about this question; that some arrangement could be effected, by which the Government interests in Pacific Railroad indebtedness, should be as little injured or impaired as practicabble or consistent with the enforcement of the specific provision of the Acts of Congress relating to the subject matter of this interest. Continuing, Judge Folger said: "I will now call the accounting officers to make an estimate of the aggregate amount of interest that has accrued on these several bonds." The accounting officers made the estimate of the amount of interest accrued and handed the same to Judge Folger. This estimate disclosed that a sum somewhat exceeding $76,000,000 of interest had accrued. Judge Folger then made the remark to me that at this particular time great advantage would result to the government and also to the holders of the first mortgage bonds if I and the government would compromise in some way this matter of interest accrued, and to illustrate his meaning, stated that in places where the country had been somewhat settled, land rose very rapidly in value, but that there was an immense reserve of lands which in a period of ten years from now would rise in value and thereby, possibly, enable both the government and the holders of the first mortgage bonds to receive the full benefit of the face value of their respective bonds. "Bear in mind, Mr. Blaisdell, that it now rests with you to determine whether the foreclosure shall be ordered by the Attorney General; it shall be strictly in conformity with the provisions named in these Acts of Congress referred to or otherwise. I then asked Mr. Folger the question. "Will you permit me to ask of you several questions before I give a decision upon this matter." The Judge replied, "Certainly, ask me any question you desire." I then asked him first the question, "What amount of interest is allowed by the government on what is termed the "sinking fund"? He answered, "Five per cent. per annum." I said, "Do you think that by consent

and joint agreement between myself and the government there could be introduced in Congress an Act providing that the government should become security for the payment of this amount of accrued interest and fund the said amount of accrued interest in such manner as that the creditors first mortgage could receive the benefit thereof." The judge replied that he thought it could be done, and immediately referred the question to Attorney General Brewster, who answered, "I concur in your opinion, Judge Folger."

Q. Mr. Blaisdell I would like for you to state when and how and from whom you received your first information that Durkee was the owner of the first mortgage bonds of the Central and Union Pacific Railroad, and what instructions, if any, were given to you as to the course you should pursue in protecting the interests of his estate, and if you followed the instructions.

* * * * * * * * * *

A. The first information that I received informing me that Durkee was the owner of the first mortgage bonds of the Pacific Railroad as aforesaid, was when it was read to me from the first mortgage bonds as before stated, by Judge Folger, as before stated. The date was in the hours of 11 and 12 o'clock April 22, 1884. The instructions that I should proceed under from Secretary Folger himself by correspondence, were given to me through correspondence, somewhere from eighteen months to two years preceding April 22, 1884. I have been acting under the instructions of said Judge Folger Secretary of Treasury. The instructions were to first get a complete and certified record from both the Probate Court of Kenosha County and the Circuit Court of Kenosha County, Wisconsin. I got them and had them at that meeting and left them there in the custody of the government. All this correspondence in reference to instructions was left at that meeting with Secretary Folger. I was to ascertain for the information of the government

what had been the decisions in any of the courts in respect of the will of Charles Durkee. My instructions were to bring certified copies of powers of attorney that I represented the heirs of the estate of Charles Durkee. I did procure the powers of attorney as instructed and the same presented to Judge William Lawrence, First Comptroller of the Treasury, who upon examination of the powers of attorney and records aforesaid, declared to the Attorney General and Judge Brewster and Judge Folger that I was the legally accredited representative of the estate of Charles Durkee and as such I present him to you, Judge Folger. All the suits that I have brought were brought before this meeting in 1884.

* * * * * * * * * *

Q. Did you bring any suits?

A. Certainly I did.

Q. State what the suits were.

A. I will state as briefly as possible. The suits brought in Chicago and those brought in Milwaukee, Wisconsin all pertained to matters outside of Pacific Railroad bonds.

Q. State what was the character of those suits.

A. The character was to determine whether there were any assets of the State of Charles Durkee to be administered and if so, what they were.

* * * * * * * * * *

Q. Who else were present beside yourself, Folger and Cannon?

A. Judge Brewster, Secretary of State, Freelinghuysen, U. T. Wyman, Treasurer of the United States, Judge Lawrence, Eugene B. Daskam, William Fletcher, Henry M. Taylor, Secretary of Interior.

Q. That is to say, all the cabinet officers were there as you remember except the Secretary of Navy and the Secretary of War? How long did Mr. Cannon remain?

A. Mr. Cannon immediately departed as soon as he had finished the introduction.

* * * * * * * * * *

Q. Who next spoke?

A. Judge Folger.

Q. What did he say?

A. He arose and said "I guess gentlemen, I can throw a little light upon that subject. Mr. Blaisdell's question to the department was, 'what bonds of indemnity were signed by Charles Durkee, late Governor of the Territory of Utah, to the United States, in his lifetime or during his incumbency in office.'" Briefly, Mr. Folger said they were bonds of indemnity and forfeiture to the United States government in the sum of $3,000,000 in case of the incompletion of the Pacific Railroad lines by a given date. He said, "I discover that these bonds have been properly cancelled." At that point he asked me what I knew about the matter. I said, "I know absolutely nothing about that matter." He seemed to be somewhat surprised and made the remark that that was strange, considering my relation to the family. "You will not think it strange, judge," I said, "when I inform you that it was some time after the year 1875 before I learned that my wife was any relation to Charles Durkee."

Q. Who spoke next.

A. I did, myself.

Q. Tell what you said.

A. I do not know how this bond matter might affect the estate. I understand there seems to be another unadjusted account between the estate and the government, and that it relates specifically to those bonds.

Q. What did he say to that?

A. I have here, he say, "upon these tables, the bonds of all these respective railroad companies duly executed as first mortgage bonds of alien prior and paramount to that of the United States, and also a collection of bonds deposited by the company with the Secretary of the Treasury of the United States, to secure interest upon the first mortgage bonds aforesaid." Folger speaking, said: "I find that some of my predecessors in office have credited

these bonds as payments of interest, but when I came into the office I took exception to these credits because the law requires payment of the interest accrued to the holders of the bonds. I now put the question to you, Judge Brewster, do these interest bonds constitute the payment of interest within the proper meaning of the Acts of Congress relating to public matter?" Judge Brewster replied that they did not. Turning to myself Judge Folger said, what now do you want done with these bonds, and I answered, "I want to have the protection of the bonds, interest bonds and principal, as provided by the Acts of Congress."

* * * * * * * * * *

Q. Did Judge Folger take up and read to you what purported to be an interest bond.

A. He did.

Q. How many did he read of them?

A. Six.

Q. How happened there to be six.

A. Because they have got six railroad companies of that particular character.

Q. Give the names of these six companies.

A. Central Pacific, Union Pacific, U.P. Branch, Central Pacific; Sioux City Pacific, Western Pacific, Kansas Pacific.

Q. What were the dates of these different bonds?

A. The dates were all before the issuance of a single subsidy bond, as I remember.

Q. How many first mortgage bonds did he read to you?

A. As I remember, only one of each company.

Q. Six in all?

A. Yes, sir.

EXHIBIT B

Deposition of William R. Russell

By Mr. Wood:

Q. State your name, age, residence and occupation?

A. William R. Russell; of lawful age; Kensington, Md., Clerk in the U.S. Treasury Department.

Q. How long have you been a clerk in the Treasury Department?

A. Twenty years; I have charge of the vault of the Treasurer's office.

* * * * * * * * * *

Q. Have you any record in your custody of the contents of that Bond Vault, showing who was the owner of the 1st Mortgage Lein on the Union, Central, Western and Kansas Pacific Railways?

A. Some of these 1st Mortgage Bonds were in the vault since I have been in charge.

Q. Are they there now?

A. No, sir.

Q. Do you know what became of them?

A. They were sent to the Assistant-Treasurer at New York by Messengers and by Express, for the purpose of redemption by the railway companies, being usually sent in advance of their maturity. I took some of them to New York myself and delivered them to the Assistant-Treasurer of the United States at the Sub-Treasury.

Q. Did you make the collection or just delivered them to the Assistant-Treasurer?

A. I merely acted as Messenger to take them to New York and delivered them to the Assistant-Treasurer of the United States, for redemption by the said railway companies.

Q. Do you know what amounts you delivered?

A. They varied at the different times—the first were dated in 1865 and were 30 year bonds. They began to

mature in 1895—from that on to 1899, and were sent out as fast as they became due.

Q. What railroads were they on?

A. Union, Central, Eastern Division of the Union (100) or Kansas Pacific, Sioux City and the Western Pacific Railways.

Q. Do you recollect the total amount of them?

A. I do not.

Q. Then all of these 1st Mortgage Bonds have been passed out of your vault and you have none of the 1st Mortgage Bonds of the Central, Union, Western or Sioux City or Kansas Pacific Railways, in your vault or under your control?

A. No, sir; they have all been sent or taken to the Assistant-Treasurer of the United States at New York.

EXHIBIT C

"Office of the Secretary of State
Washington, D. C.

January 19th, 1885

Know All Men by These Presents:

On behalf of Leonard C. Blaisdell, Attorney of Record for the Estate of the Honorable Charles Durkee, deceased, Kenosha, Wisconsin, I am herewith setting forth facts relating to a meeting held in the United States Treasury Department, on April 22, 1884, and causing same to be made of record in this office.

I was present at this meeting, together with the First Comptroller, Judge William Lawrence, Secretary of the Treasury, C. J. Folger, Solicitor of the Treasury, Dr. Thomas Robinson, and other Treasury Employees, when Judge Folger, Secretary of the Treasury said that Leonard C. Blaisdell had come to the Treasury Department by appointment, with proper credentials to prove that he was

the Attorney-of-Record for the heirs at law for the Estate of the Hon. Charles Durkee.

At this meeting, all of the Treasury and Government officials heard Judge Folger ask the question of Judge Lawrence: "Have you examined the credentials of Mr. Blaisdell?" and Judge Lawrence replied: "I have examined them and find that he is the proper person for us to do business with." Judge Folger then turned to the Attorney General and said: "We have here all of the First-Mortgage Prior Lien Bonds of the Union Pacific and Central Pacific Railroads, in round figures amounting to $64,000,000, and they are all assigned to one sole assignee: Charles Durkee."

Attorney General Brewster, Judge William Lawrence, Secretary C. J. Folger and myself, all saw the bonds and the assignment of these bonds to Charles Durkee.

After considerable discussion with Mr. Blaisdell, Judge Folger addressed Judge Lawrence with this remark: "You will make a complete record of this transaction of this meeting and deliver to Mr. Blaisdell a perfect record thereof. In addition thereto, you will issue to Mr. Blaisdell an instrument setting forth that the United States Government guarantees the payment of the principal of these bonds and as much interest as shall be due, up to and including December 31st, 1884.

In Witness Whereof I have hereunto affixed my hand and Seal of the United States this nineteenth day of January, A.D., Eighteen Hundred and Eight-Five.

FREDK. T. FRELINGHUYSEN,
Secretary of State

Attest:
(Seal of U.S.)"

EXHIBIT D

Chicago, Ill.

April, 30th; A.D. 1884.

Hon. Wm. Lawrence.

'1st; COMPTROLLER—United States TREASURY."

Dear Sir:

I have the honor to acknowledge' the favors shown to myself' (official) on the 22nd; inst; :when I was met by a number of the Gentlemen Representing the Treasury; & Interior Departments! (perhaps others!) and would beg leave to say; that from want of personal recognition of most of the gentlemen with whom I met, I am now laboring under some embarrassment: which I beg your assistance in removing.

.....

The slip of paper kindly furnished me, (with names of such 'Officers as I was to have communicated with) I can not now find! and would be obliged if the gentleman who furnished it will duplicate the same and send to me.

.....

I wish also to say! 'that it is the SUPERIOR COURT of COOK COUNTY, (Chicago); (with U.S. Jurisdiction of the questions at issue, that is to be addressed; (through its Clerk;—John J. Healy: by any 'Officer of the Govcernment that may have material evidence on the questions at issue to communicate to this court.

.....

And further; at the present time; such matter as may' tend to show up all the 'accounts of every kind had between the late CHARLES DURKEE and the United States; are

hereby Officially, (and respectfully) called for); by the undersigned

—'L. C. BLAISDELL!
'In His Capacity as Acting Attorney''
''Representing (for 'His Next of Kin,)
''All The 'INTESTATE ASSETS ''of the Deceased''
''Charles Durkee, Governor of Utah.''

172597

8884 3/44

First Comptroller's Office

May 7, 1884.

Respectfully referred to the Hon. Secretary of the Treasury with the request that he permit or direct the Register to furnish this office with the information called for, if, in his judgment, it is proper to be given; and if not, that these papers be returned.

[signature]

Dep'y Comptroller

Treasury Department

May 9th 1884.

Respectfully referred to the Hon. Register of the Treasury, with the request that he furnish the information desired to this Office.

[signature]

Assistant Secretary

9228 3/44

Chicago, Ills.

April 30, 1884.

L. C. Blaisdell

Rel. to the Geo. Burkee matter

Register's Office.

May 6, 1884.

Respectfully returned to the Hon 1st Comptroller of the Treasury.

Information of this nature can be given only by the direction or discretion of the Hon. Secretary of the Treasury.

[signature]

Register

Mr. Laurence

May 6 1884

Treasury Department

May 12, 1884.

Respectfully returned to the Hon. First Comptroller of the Treasury, with the information that Mr L. C. Blaisdell has been furnished with the information requested herein, respecting U. S. bonds supposed to have been held by Charles Burkee.

[signature]

Assistant Secretary

Mr. Laurence

May 13. 84.

39a

IN THE UNITED STATES COURT OF CLAIMS

No. 401-64

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED

v.

THE UNITED STATES

Order

This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof, together with the opposition thereto, and without oral argument, it is concluded that plaintiff's alleged claim is barred by the statute of limitations, 28 U.S.C. § 2501 and the doctrine of laches, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

WILSON COWEN
Chief Judge

Oct. 29, 1965

Volume 5, Comptroller's Decisions—Lost Bond Case

If the finder of a lost bond present it to the Treasury Department, the possession of it by the officers of the Department raises no legal presumption of payment. The law presumes, and the fact is, that such record will be kept of it as will protect the rights of the real owner. The usage as to the bonds now in question, and as to all bonds presented for payment, or for the issue of a duplicate as to which there is a question of controverted ownership is to stamp them thus: "Treasury Department, Office of the

Secretary, April 22, 1884. Held for decision of ownership," * and a proper record is made to protect the rights of claimants. In legal contemplation, the possession of such bond by the Government involves no danger of its destruction or other act to the prejudice of the rightful owner. He is protected by the stamp and record to which reference has been made. Thus the highest guaranty is given that the rights of the real owner will be protected. The Government keeps a record of its public debt open to the inspection of every person interested. The finder of bonds may or may not keep such a record. He has no interest in doing so, and if he do so, it is not open to the inspection of private claimants; and the legal means for obtaining information, or of securing inspection may be difficult if not doubtful. The Government, in its statement of the public debt, periodically published, makes known the amount of matured and unpaid public securities.

APPENDIX B

Section 10 of the Act of July 2, 1864, 13 Stat. 356, Amending the Act of July 1, 1862, 12 Stat. 489

SEC. 10. *And be it further enacted,* That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And

---

* This stamp was procured at the instance of the present Comptroller to be applied to all such bonds.

the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

Section 3 of Joint Resolution of the Congress of April 10, 1869, 15 Stat. 348

SEC. 3. *And be it further resolved,* That the President is hereby authorized and required to withhold from each of said companies an amount of subsidy bonds authorized to be issued by the United States under said acts sufficient to secure the full completion as a first-class road of all sections of such road upon which bonds have already been issued, or in lieu of such bonds he may receive as such security an equal amount of the first mortgage bonds of such company; and if it shall appear to the President that the amount of subsidy bonds yet to be issued to either of said companies is sufficient to insure the full completion of such road, he may make requisition upon such company for a sufficient amount of bonds already issued to said company, or in his discretion of their first mortgage bonds, to secure the full completion of the same. And in default of obtaining such security as [is] in this section provided, the President may authorize and direct the Attorney-General to institute such suits and proceedings on behalf and in the name of the United States, in any court of the United Sates having jurisdicion, as shall be necessary or proper to compel the giving of such security, and thereby, or in

any manner otherwise, to protect the interests of the United States in said road, and to insure the full completion thereof as a first-class road, as required by law and the statutes in that case made.

Sections 3, 8 and 9 of the Act of May 7, 1878, 20 Stat. 56

SEC. 3. That there shall be established in the Treasury of the United States a sinking-fund, which shall be invested by the Secretary of the Treasury in bonds of the United States; and the semi-annual income thereof shall be in like manner from time to time invested, and the same shall accumulate and be disposed of as hereinafter mentioned. And in making such investments the Secretary shall prefer the five per centum bonds of the United States, unless for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable to invest in other bonds of the United States. All the bonds belonging to said fund shall, as fast as they shall be obtained, be so stamped as to show that they belong to said fund, and that they are not good in the hands of other holders han the Secretary of the Treasury until they shall have been indorsed by him, and publicly disposed of pursuant to this act.

* * * *

SEC. 8. That said sinking-fund so established and accumulated shall, according to the interest and proportion of said companies respectively therein, be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such companies respectively, lawfully paramount to the rights of the United States, and for the claims of other creditors, if any, lawfully chargeable upon the funds so required to be paid into said sinking-fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity, to the end that all persons having

any claim upon said sinking-fund may be entitled thereto in due order; but the provisions of this section shall not operate or be held to impair any existing legal right, except in the manner in this act provided, of any mortgage, lien, or other creditor of any of said companies respectively, nor to excuse any of said companies respectively from the duty of discharging, out of other funds, its debts to any creditor except the United States.

SEC. 9. That all sums due to the United States from any of said companies respectively, whether payable presently or not, and all sums required to be paid to the United States or into the Treasury, or into said sinking-fund under this act or under the acts hereinbefore referred to, or otherwise, are hereby declared to be a lien upon all the property, estate, rights and franchises of every description granted or conveyed by the United States to any of said companies respectively or jointly, and also upon all the estate and property, real, personal, and mixed, assets, and income of the said several railroad companies respectively, from whatever source derived, subject to any lawfully prior and paramount mortgage lien, or claim thereon. But this section shall not be construed to prevent said companies respectively from using and disposing of any of their property or assets in the ordinary, proper, and lawful course of their current business, in good faith and for valuable consideration.

Section 4 of the Act of March 3, 1887, 24 Stat. 488

SEC. 4. That whenever, in the opinion of the President, it shall be deemed necessary to the protection of the interests and the preservation of the security of the United States in respect of its lien, mortgage, or other interest in any of the property of any or all of the several companies upon which a lien, mortgage, or other incumbrance paramount to the right, title or interest of the United States for the same property, or any part of the same, may exist

and be then lawfully liable to be enforced, the Secretary of the Treasury shall, under the direction of the President, redeem or otherwise clear off such paramount lien, mortgage, or other incumbrance by paying the sums lawfully due in respect thereof out of the Treasury; and the United States shall thereupon become and be subrogated to all rights and securities theretofore pertaining to the debt, mortgage, lien, or other incumbrance in respect of which such payment shall have been made. It shall be the duty of the Attorney General, under the direction of the President, to take all such steps and proceedings, in the courts and otherwise, as shall be needful to redeem such lien, mortgage or other incumbrance, and to protect and defend the rights and interests of the United States in respect of the matters in this section mentioned, and to take steps to foreclose any mortgages or lien of the United States on any such railroad property.

SEC. 5. That the sinking-funds which are or may be held in the Treasury for the security of the indebtedness of either or all of said railroad companies may, in addition to the investments now authorized by law, be invested in any bonds of the United States heretofore issued for the benefit of either or all of said companies, or in any of the first-mortgage bonds of either of said companies which have been issued under the authority of any law of the United States and secured by mortgages of their roads and franchises, which by any law of the United States have been made prior and paramount to the mortgage, lien, or other security of the United States in respect of its advances to either of said companies as provided by law.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 955

HOWARD T. FOULKES, ADMINISTRATOR IN THE WILL OF CHARLES DURKEE, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner instituted this action in the United States Court of Claims in November 1964, seeking a judgment of $187,500,000 against the United States based upon alleged ownership by petitioner's decedent, Durkee, at the time of his death in 1870, of certain railroad bonds allegedly held by the United States (Pet. App. 1a-4a). The Court of Claims granted (Pet. App. 41a) the motion of the United States

for summary judgment (Pet. App. 4a-14a), holding that petitioner's claim was barred by the six-year statute of limitations applicable to claims cognizable by the Court of Claims (28 U.S.C. 2501), and by laches. This holding is clearly correct, and further review is not warranted.

Durkee died in 1870, and the claim here sued upon could have accrued no later than his death. That was almost a century ago; the applicable statute of limitations (28 U.S.C. 2501) is six years and there is nothing to suggest that it has been tolled.[1] For there is no indication that proper representatives of the estate were not appointed in 1870 at Durkee's death, when his will was admitted to probate (Pet. App. 2a), and in any event petitioner himself has been administrator for almost 21 years, since his appointment on May 2, 1945 (Pet. App. 1a)—far longer than the statutory period of limitations.

Nor is petitioner helped by advancing a trust theory as the basis of his claim. The period of limitations in an action for money held in trust begins to run when the trust is repudiated. *Harrison* v. *United States*, 20 Ct. Cl. 175. For present purposes, that was no later than 1914, when the Treasury, in a press release (Pet. 13a-14a) designed to warn the public against promoters who were selling interests in the

---

[1] 28 U.S.C. 2501 provides in part: "A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

Durkee claim, stated that there was not—and never had been—any basis for such claim.[2]

---

[2] The history of the Durkee claim corroborates the Treasury's statement. In 1896 a petition by one Blaisdell (a beneficiary of the estate or representative of the beneficiaries) in the Court of Claims was dismissed apparently on the ground that he was not the proper party to sue. 31 Ct. Cl. 464. In 1900, a petition in the Court of Claims (Pet. App. 9a-10a) filed by one Kuykendall, who appeared to be the administrator of the estate, was also dismissed. 35 Ct. Cl. 639. Kuykendall then brought suit in the Supreme Court for the District of Columbia against the Secretary of the Treasury and the Treasurer of the United States (Pet. App. 11a-12a); the suit was later dismissed on his motion (Pet. App. 5a-6a).

In 1903 Kuykendall brought suit to have the alleged bonds declared a first mortgage on the property of the Union Pacific Railroad. The Circuit Court of Appeals for the Eighth Circuit in *Kuykendall* v. *Union Pacific Railroad Co.*, 163 Fed. 819, reviewed the evidence submitted to show Durkee's asserted ownership of the bonds (apparently essentially the same evidence as was introduced here) and concluded that the evidence was "incoherent, disjointed, and pointless." *Id.* at 820. It further noted that it had given counsel a chance to call certain witnesses who would have been able to substantiate the claim, if true, and that counsel had refused. *Id.* at 822. Noting that it seemed "positively incredible that Mr. Durkee, who died testate in 1870, would make no mention in his will of the ownership of such a fabulous fortune," the court affirmed the dismissal of the suit. *Id.* at 822, 823.

In 1927, the conviction of three promoters of the Durkee claim for mail fraud was affirmed by the Fourth Circuit in *Stearn* v. *United States*, 18 F. 2d 465, the court noting (*id.* at 468) that "[i]t is difficult to impartially review this testimony * * * without being impressed with the fact that the so-called Durkee claim, as containing any real existence or valid charge against the government, was wholly fictitious."

We note that the *Lost Bond Case*, 5 First Comptroller's Decisions 197 (1884), cited by petitioner (Pet. 7), has no conceivable relation to this case.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 207946 604

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 15 1966
JOHN F. DAVIS, CLERK

No. 955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION

LAWRENCE J. SIMMONS
Shoreham Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:

WOODROW E. FAULKNER
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 955

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION

Petitioner respectfully represents that the Memorandum in Opposition is deficient and is rebutted for two distinct reasons:

(A) It does not properly advise the Court of the facts pertaining to this case as concerns the Kuykendall Case, the Treasury Department press release of January 26, 1914 respecting repudiation of the Trust under the Thurman Act and its relevancy to the Durkee claim, and its denial of the

applicability of the Lost Bond Case to the Durkee claim is without verification as to any other purpose.

(B) It did not discuss the question of the material issue of facts raised by the Petition. It did not admit nor deny the existence of Secretary of State Frelinghuysen's statement of January 19, 1885 pertaining to the six main points raised by L. C. Blaisdell in his affidavit filed in the United States District Court in Utah. The Respondent quoted the Court's reference to Blaisdell's testimony as being "incoherent, disjointed, and pointless." The Court's opinion further referred to Blaisdell as being "mentally unbalanced." Nor did it discuss other material evidence now in the Appendix to the Petition bearing on a factual issue.

(1) With respect to Reason (A) and the Kuykendall decision, rendered by the 8th Circuit Court of Appeals (hereinafter referred to as Court), bearing upon the decision's control of any action filed by the Durkee estate, Petitioner submits:

(a) The decision, rendered in 1908, hardly covered the jurisdictional issue raised in the Appellate Court. The Court admitted Durkee was not a resident of Utah on the date of his death. The decision erroneously stated Durkee died in Wisconsin in 1870. He died in Omaha, Nebraska January 14, 1870. Thus, the jurisdictional issue should have been dispositive of the appeal rather than the ownership issue.

(b) The parties to this present action, the legal representatives of the Durkee estate from Wisconsin, the State of his residence, and the United

States, were not parties in the Utah suit and the Utah decision had no reference to either of them and was not binding upon either of them.

(c) The Utah decision, on the ownership issue, centered around what Blaisdell said at a meeting he had with Treasury Department officials and Cabinet officers on April 22, 1884. The decision stated that a *reading* of his testimony furnished *ample proof* he was "visionary," "impractical," and "mentally unbalanced," and that his *statements* were "incoherent, disjointed, and pointless." Further, it referred to his "straggling statement," and said "His version of what occurred, what was said, and what was the exact subject matter of the discussion is so vague and disjected as to *mystify rather than to enlighten.*"

(d) Blaisdell's testimony before the Court was by affidavit and the decision should have recognized this and that he did not want to have anything to do with the suit in Utah and did not authorize the suit. Thus, the lower court had no opportunity to observe him as a witness or to appraise his demeanor or ability to testify. Such references to him quoted in the 1908 decision are not justified nor appropriate and exceed judicial fairness.

(e) The Respondent's memorandum referred to the Court offering Kuykendall counsel the opportunity of bringing in Senator Teller to testify there, ore tenus, which offer was declined. This was not Blaisdell's case, nor Petitioner's. In addition to Senator Teller, who had attended the April 22, 1884 meeting in question, as Secretary of Interior, there were alive in 1908, Dr. Thomas Robinson, U. T. Wyman, Eugene B. Daskam, and

William Fletcher, who also attended the meeting. The latter two had local Washington addresses in 1908 and Daskam was still a Treasury Department official. There was also Speaker of the House Joseph G. Cannon who introduced Blaisdell to First Comptroller Lawrence and Secretary of the Treasury Folger. All the names of these officials were before the Utah Court when it heard the appeal arguments.

(f) The Court, being aware there was a person alive who attended the April 22, 1884 meeting, and inquiry could have ascertained the existence of the others, should have remanded the case to the lower court for the purpose of taking any additional testimony on this vital ownership question in view of its attack upon Blaisdell's credibility because of lack of corroboration. Blaisdell gave identically the same testimony, *in person,* before a United States Senate Sub-Committee (Senate Document 314, 54th Congress, 1st Session) on March 19, 1896, that he gave in affidavit form before the lower Utah Court. No other public official or body described him mentally unbalanced, visionary, or said his statements were incoherent or pointless. Nor did the Court consider the corroborative evidence in the case and before the Court, of former Congressman DeWeese, on the ownership question.

(g) The Appellate Court did not have before it the statement of Secretary of State Frelinghuysen, dated January 19, 1885. Blaisdell had referred to this statement, and the fact he had secured it, in his testimony before the Senate sub-committee on March 19, 1896, at page 417. The Frelinghuy-

sen statement corroborated the six main points of Blaisdell's testimony both before the Senate sub-committee and the Utah Court as to what transpired at the April 22, 1884 meeting. These points are (a) the principal parties present, (b) the examination of his credentials, as the Durkee representative, by First Comptroller Lawrence, (c) the statement by Secretary Folger that Durkee was the sole assignee of all the Pacific railroad First Mortgage Bonds, (d) the directive to Lawrence to make a record of the meeting, (e) that all present saw the bonds and the assignment, and (f) the Government guaranteed principal and interest through December 31, 1884. The Frelinghuysen statement was over the Great Seal of the United States. Thus, the ownership ruling was inappropriate and clearly erroneous since it did not have all the available evidence upon which to base a decision. And if there was mystification and non-enlightenment in Blaisdell's affidavit to the Utah Court, a comment or ruling by the Court on the Frelinghuysen statement, over the Great Seal, should have been made. The lack of it by that Court, or any Court, in view of its importance as a public document, should render any decision on the ownership question null and void.

(h) With reference to the Respondent's quoting the Kuykendall opinion that it was incredible Durkee did not mention this fortune in his will, Petitioner, here, refers to the evidence thereon before the Court. That Court had the testimony of former Congressman DeWeese, who, in referring to the railroad bonds, stated that although Durkee owned or controlled all of them, they were worth

around 10¢ on the dollar. Thus, if there was a fortune in 1869 it was, at most, an indeterminable paper one.

(i) Respondent refers to the Stearns mail fraud case. The Court in that case distinguished between collecting money for what it considered an unfounded claim but with an honest intent, and collecting money for the benefit of the defendants only. The Stearns case, however, did not have as as much evidence before it on the ownership question as did the Utah Court wherein the latter opinion was quoted approvingly in the former. Thus, we have two cases, one relying on the other, and both with insufficient evidence to decide the ownership issue.

(j) With respect to the Treasury press release, relied upon by Respondent as constituting a repudiation of the trust, that release cannot serve inconsistent purposes as advanced by Respondent. If the Trust was repudiated no later than 1914 by the release, to commence the running of the statute of limitations, there would have to be an acknowledgment of a trust. However, Respondent says in the same paragraph the release is authority for its position there is no basis for the Durkee claim. Either there is an admission of a trust with a repudiation, or a denial that a trust existed which renders a repudiation impossible. Additionally, Petitioner contends the press release, prepared under the Secretaryship of William McAdoo (a former railroad lawyer) does not accurately state the facts as to the Durkee claim, its dealings with the Government departments, does not accurately state the facts respecting the First Mortgage

Bonds, nor the legal status of the Trust Fund set up by Congress under the Thurman Act. Petitioner is prepared to submit substantial evidence on these points.

(k) Respondent states the Lost Bond Case has no conceivable relation to this case. The decision, written by First Comptroller Lawrence, dated April 22, 1884, was for the purpose of establishing an express trust by the Government on behalf of the Durkee estate. A *reading* of the decision, itself, clearly shows it could only have referred to the First Mortgage Bonds discussed at the April 22, 1884 meeting and could not have been rendered for any other purpose. Also, the decision is the actual record of the April 22, 1884 meeting Lawrence was requested to make. It says, "Held for decision of 'ownership' and a *proper record* is to be made to protect the rights of claimants."

(2) With respect to question (B), Respondent remained silent and did not offer evidence or coment on the material facts issue. This silence is very significant. As the Respondent states, the Durkee claim is almost a century old, and so is the reluctance of Respondent to discuss the issues or talk about the facts upon which it is based. The Respondent, despite all the conceivably valid contentions raised, has never been required to answer them or to stand trial on the merits of this claim. Respondent has too long evaded its clear public responsibilities in this case. It should not be permitted to stand upon a Court decision that a reading of shows it to be prejudicial, and an examination of it, based upon the issues involved and the evidence available, clearly indicate it to be below the dignity of the judiciary and not applicable in this case.

Nor should Respondent be permitted to find refuge in a mere press release so inaccurately worded that not only is its worth as a public document in serious question but that the purpose for which it was intended is debatable. Further, there is no evidence in the record it was ever published or delivered to the Durkee estate.

Specifically, the Respondent has never discussed or explained:

(a) The testimony given by Senator John Sherman on the floor of the United States Senate on April 9, 1869, wherein he referred to the perhaps illegal deposit of $3,000,000 of Union Pacific First Mortgage Bonds with the United States. This appears to be a contradiction of the Respondent's position taken in the January 26, 1914 press release where it is stated that no bonds have been deposited with any branch of the Government except those in pursuance of the April 10, 1869 resolution. The bonds referred to in the Finance Report, cited by the release, were not First Mortgage Bonds.

(b) The statement of Secretary of State Frelinghuysen dated January 19, 1885. This statement, over the Great Seal of the United States and set out in Exhibit C of the Petition, is a Government admission of ownership, thus Respondent's reluctance to discuss it stands as an admission of its validity. Also, the fact that this statement is corroborative of all that Blaisdell said with respect to the six main points raised in his testimony before the Appellate Court and the Senate would render the 1908 Court decision valueless on the ownership question. Respondent should be re-

quired to admit or deny this very important document.

(c) The evidence set out in Exhibit D of the Petition pertaining to correspondence Blaisdell had with the Treasury on April 30, 1884. These two documents were found in the Treasury archives. The memorandum attached to the letter, in the handwriting of Treasury officials, shows a reply was made to the letter. This evidence also should confirm there was a meeting on April 22, 1884 and that there was correspondence pertaining thereto. It should also satisfy the Court's reference to the Treasury Department's known exactness in record keeping, for the reply, referred to above, was not found. Respondent should be required to admit or deny the above documents and their applicability to this claim.

(d) The deposition of William R. Russell set out in Exhibit B. This deposition states that the First Mortgage Bonds of the Pacific railroads were in the Treasury Department vaults and were taken therefrom and delivered to the New York Sub-Treasury for redemption. Respondent should be familiar with Russell's duties and responsibilities.

In view of the Petition filed herein, the memorandum in opposition filed by Respondent, and the reply submitted herewith, together with other substantial evidence now in Petitioner's possession bearing upon the validity of this claim, Petitioner prays that this Petition for a Writ of Certiorari be granted and that

this cause be returned to the Court of Claims for further action.

Respectfully submitted.

LAWRENCE J. SIMMONS
Shoreham Building
Washington, D. C.
Attorney for Petitioner

Of Counsel:

WOODROW E. FAULKNER
Washington, D. C.